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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION**

**PETUNIA PRODUCTS, INC. dba
BILLION DOLLAR BROWS,**

Plaintiff,

v.

**RODAN & FIELDS, LLC, MOLLY
SIMS, and DOES 1 TO 20,**

Defendants.

Case No.: SACV 21-00630-CJC (ADSx)

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT’S
MOTION TO DISMISS [Dkt. 18]**

I. INTRODUCTION

In this case, Plaintiff Petunia Products, Inc. alleges that Defendants Rodan & Fields, LLC (“R+F”), Molly Sims (“Sims”), and unnamed Does committed direct trademark infringement, contributory trademark infringement, false advertising under Cal. Bus. & Prof. Code § 17500, and unlawful and unfair business practices under Cal. Bus. & Prof. Code § 17200 arising from the marketing and sale of R+F’s “Brow Defining

1 Boost” product. (Dkt. 1 [hereinafter “Compl.”].) Before the Court is Sims’ motion to
2 dismiss. (Dkt. 18 [hereinafter “Mot.”].) For the following reasons, the motion is
3 **GRANTED IN PART AND DENIED IN PART.**¹

4 5 **II. BACKGROUND**

6
7 Plaintiff, an international cosmetics company, owns the BROW BOOST ®
8 trademark (the “Trademark”), which it uses in connection with its “Billion Dollar Brows”
9 eyebrow primer and conditioner product. (Compl. ¶¶ 14, 16.) On or around July 9, 2020,
10 R+F, a cosmetics company in competition with Plaintiff, began to sell a product called
11 “Brow Defining Boost” (the “Allegedly Infringing Product”). (*Id.* ¶¶ 21, 23.) Plaintiff
12 alleges that the Allegedly Infringing Product, which performs a similar function as
13 Plaintiff’s product, illegally utilizes the Trademark on the product’s packaging and
14 marketing. (*Id.* ¶¶ 23–25.) For example, Plaintiff alleges that R+F used Google’s
15 AdWords service to bid on search terms that use the Trademark. (*Id.* ¶¶ 34–35.) As a
16 result, customers who search for “Brow Boost” on Google are directed to hyperlinks for
17 the Allegedly Infringing Product. (*Id.* ¶ 39.) Plaintiff also alleges that the consultants
18 who sell the Allegedly Infringing Product on R+F’s behalf promote the product on social
19 media using the hashtag “#BROWBOOST,” thereby diluting Plaintiff’s social media
20 presence. (*Id.* ¶ 56.)

21
22 Plaintiff also alleges that R+F uses “Influencer blogging” to market the Allegedly
23 Infringing Product. (*Id.* ¶ 41.) According to Plaintiff, an influencer is a person
24 “presumed to have the power to affect the purchase decisions of others.” (*Id.* ¶ 42.) Sims
25 is a fashion model and an influencer who promotes various cosmetic products on her own

26
27 ¹ Having read and considered the papers presented by the parties, the Court finds this matter
28 appropriate for disposition without a hearing. *See* Fed. R. Civ. P. 78; Local Rule 7-15.
Accordingly, the hearing set for August 16, 2021, at 1:30 p.m. is hereby vacated and off
calendar.

1 website. (*Id.* ¶ 44.) Sims authored a blog post in which she promoted the Allegedly
2 Infringing Product and provided a link to R+F’s website where the Allegedly Infringing
3 Product is available for sale. (*Id.* ¶ 44–45.) In the blog post², Sims opens by thanking
4 R+F for sponsoring her post. (Dkt. 19, Ex. A [hereinafter the “Blog Post”].) Sims goes
5 on to favorably review the Allegedly Infringing Product. (Blog Post.) At the end of the
6 post, she includes a link to R+F’s website for those who want to “learn more about how
7 to purchase Brow Defining Boost.” (*Id.*) The end of the blog also includes an image of
8 the Allegedly Infringing Product and its price. (*Id.*)

9 10 **III. LEGAL STANDARD**

11
12 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the legal
13 sufficiency of a plaintiff’s claims. The issue on a motion to dismiss for failure to state a
14 claim is not whether the plaintiff will ultimately prevail, but whether the plaintiff is
15 entitled to offer evidence to support the claims asserted. *Gilligan v. Jamco Dev. Corp.*,
16 108 F.3d 246, 249 (9th Cir. 1997). Rule 12(b)(6) is read in conjunction with Rule 8(a),
17 which requires only “a short and plain statement of the claim showing that the pleader is
18 entitled to relief.” Fed. R. Civ. P. 8(a)(2); *see Whitaker v. Tesla Motors, Inc.*, 985 F.3d
19 1173, 1176 (9th Cir. 2021). When evaluating a Rule 12(b)(6) motion, the district court
20 must accept all material allegations in the complaint as true and construe them in the light
21 most favorable to the non-moving party. *Skilstaf, Inc. v. CVS Caremark Corp.*, 669 F.3d
22 1005, 1014 (9th Cir. 2012). To survive a motion to dismiss, a complaint must contain
23 sufficient factual material to “state a claim to relief that is plausible on its face.” *Bell Atl.*
24 *Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A complaint must contain well-pleaded

25
26 _____
27 ² Courts may take judicial notice of “documents whose contents are alleged in a complaint and
28 whose authenticity no party questions, but which are not physically attached to the pleading.”
Branch v. Tunnell, 14 F.3d 449, 454 (9th Cir. 1994), *overruled in part on other grounds by*
Galbraith v. Cty. of Santa Clara, 307 F.3d 1119 (9th Cir. 2002). Accordingly, the Court
GRANTS Sims’ request for judicial notice of the Blog Post.

1 factual allegations, not legal conclusions, that “plausibly give rise to an entitlement to
2 relief.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). In keeping with this liberal pleading
3 standard, the district court should grant the plaintiff leave to amend if the complaint can
4 possibly be cured by additional factual allegations. *Doe v. United States*, 58 F.3d 494,
5 497 (9th Cir. 1995).

6 7 **IV. DISCUSSION**

8
9 Sims moves to dismiss Plaintiff’s claims for (1) direct infringement,
10 (2) contributory infringement, (3) false advertising, and (4) unlawful and unfair business
11 practices.

12 13 **A. Direct Infringement**

14
15 Sims moves to dismiss Plaintiff’s claim for direct infringement against her because
16 Plaintiff has failed to adequately allege that the Blog Post would cause confusion as to
17 the source of the Allegedly Infringing Product. (Mot. at 5–8.) Sims argues that liability
18 for trademark infringement should not cover third parties, like her, that author sponsored
19 blogs about a product without confirming that the product does not violate trademark
20 rights. (*Id.* at 7–8.)

21
22 “To prevail on a trademark infringement claim, a plaintiff must show that the
23 defendant used the plaintiff’s trademark in commerce and that the use was likely to
24 confuse customers as to the source of the product.” *ACI Int’l. Inc. v. Adidas-Salomon*
25 *AG*, 359 F. Supp. 2d 918, 920–21 (C.D. Cal. 2005) (quotations and citation omitted). A
26 defendant uses a mark in commerce when she uses the mark in connection with the sale,
27 distribution, or advertising of goods and services. *See Bosley Med. Inst., Inc. v. Kremer*,
28 403 F.3d 672, 676 (9th Cir. 2005).

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1. Commercial Use

Sims argues that Plaintiff has not sufficiently pled that Sims used the Trademark in commerce. The Court disagrees. Although Plaintiff has not made abundantly clear that Sims' Blog Post was a paid advertisement, such is reasonably inferred from the allegations of the Complaint and the Blog Post itself. Plaintiff alleges that R+F uses influencers like Sims to market its products. (Compl. ¶ 41.) Plaintiff also alleges that Sims authored a Blog Post that promoted the Allegedly Infringing Product and provided a link to R+F's website where the Allegedly Infringing Product may be purchased. (*Id.* ¶ 45.) In her Blog Post, Sims thanks R+F for "sponsoring" the Blog Post and providing her with the Allegedly Infringing Product before its official release. (Blog Post.) She also provides a link to R+F's website so that readers can "learn more about how to purchase Brow Defining Boost," and includes an image of the product and its price with the heading "SHOP THE PRODUCT." (*Id.*) Sims' use was in connection with the advertisement of a product.

Sims expresses concern that "legitimate commentary" will be stifled if the Court considers the Blog Post to be commercial use. (Mot. at 7–8.) However, the Blog Post reflects more than mere commentary, which is protected by the First Amendment. *See Kremer*, 403 F.3d at 677. *Kremer* is instructive on this point. There, the Ninth Circuit held that the defendant's use of the plaintiff's mark on his website, which was critical of the plaintiff's business, was noncommercial in part because the defendant's website did not directly link to any commercial sites. *Id.* at 677–78. The Blog Post links to R+F's website where the Allegedly Infringing Product is sold. (Compl. ¶ 45.) The court further explained "[a]t no time did [plaintiff's website] offer for sale any product or service or contain paid advertisement from any other commercial entity." *Kremer*, 403 F.3d at 678

1 (emphasis added). Sims' Blog Post seems to be just that: a paid advertisement. She thus
2 crossed from protected consumer commentary to commercial use.

3 4 **2. Likelihood of Confusion**

5
6 Sims next argues that Plaintiff has not sufficiently pled that the Blog Post is likely
7 to confuse customers as to the source of the product. Courts consider eight factors to
8 determine whether a use creates a likelihood of confusion: (1) strength of the mark,
9 (2) proximity or relatedness of the goods, (3) similarity of the sight, sound and meaning
10 of the marks, (4) evidence of actual confusion, (5) degree to which the marketing
11 channels converge, (6) types of goods and degree of care consumers are likely to exercise
12 when purchasing them, (7) intent of defendants in selecting the infringing mark, and
13 (8) likelihood that the parties will expand their product lines. *AMF Inc. v. Sleekcraft*
14 *Boats*, 599 F.2d 341, 348 (9th Cir. 1979), abrogation in part on other grounds recognized
15 by *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 810 n.19 (9th Cir. 2003).

16
17 The Court must be mindful that “the likelihood of confusion inquiry is a fact-
18 intensive evaluation ill-suited for disposition on a motion to dismiss.” *Lucent Techs. v.*
19 *Johnson*, 2000 WL 1604055, at *2 (C.D. Cal. Sept. 12, 2000); *see RCRV, Inc. v. Gracing*
20 *Inc.*, 2016 WL 11000048, at *2 (C.D. Cal. July 20, 2016). “While dismissal of pleadings
21 on grounds that likelihood of confusion is impossible from the face of a complaint is not
22 unprecedented, dismissal would be highly unusual at this stage.” *Glob. Apogee v.*
23 *Sugarfina, Inc.*, 2018 WL 4945305, at *3 (C.D. Cal. Oct. 10, 2018) (quotations and
24 citation omitted).

25
26 Contrary to Sims' assertion, Plaintiff has sufficiently pled a likelihood of confusion
27 under the *Sleekcraft* factors. First, the name of the Allegedly Infringing Product, “Brow
28 Defining Boost,” is quite similar to the Trademark, “Brow Boost.” “Similarity of marks

1 is determined by the appearance, sound, and meaning of the marks when considered in
2 their entirety.” *Conversive, Inc. v. Conversagent, Inc.*, 433 F. Supp. 2d 1079, 1091 (C.D.
3 Cal. 2006) (quotations and citation omitted). R+F’s product contains the terms “Brow”
4 and “Boost”—the terms which comprise the Trademark—separated by the term
5 “Defining.” The separating term “Defining” does not necessarily save the Allegedly
6 Infringing Product from being confusingly similar to the Trademark. *See id.*
7 (“Similarities are weighed more heavily than differences.”) (citation omitted). Plaintiff
8 further alleges that it is in direct competition with R+F and that its product which utilizes
9 the Trademark and the Allegedly Infringing Product serve a similar purpose. *See id.* (“If
10 goods directly compete, then confusion will usually arise....”). Plaintiff also alleges that
11 it uses similar marketing channels as R+F. *See id.* at 1092 (“Convergent marketing
12 channels increase the likelihood of confusion.”) (quotations and citation omitted).

13
14 According to Plaintiff, the confusion of customers is compounded by Sims’
15 blogging activity. Sims wrote a Blog Post sponsored by R+F in which she promoted a
16 product which competes with Plaintiff’s product, sounds like Plaintiff’s product, and is
17 marketed through similar channels as those used by Plaintiff. (*See* Compl. ¶¶ 16, 21-23,
18 45.) Sims uses the term “Brow Defining Boost” several times throughout the post. (Blog
19 Post.) Given the similarity between “Brow Boost” and “Brow Defining Boost,” it is
20 plausible that readers of Sims’ Blog Post might believe that the Allegedly Infringing
21 Product is affiliated with Plaintiff. Sims nevertheless argues that this cannot be, since she
22 identified R+F as the source of the Allegedly Infringing Product and made no mention of
23 Plaintiff or its product. (Mot. at 6). But identifying R+F as the source does not
24 necessarily mean a consumer will not infer an affiliation between R+F and Plaintiff. *See*
25 *A. T. Cross Co. v. Jonathan Bradley Pens, Inc.*, 470 F.2d 689, 692, (2d Cir. 1972)
26 (“Addition of [the defendant’s name] does not save the day; a purchaser could well think
27 plaintiff had licensed defendant as a second user and the addition is thus an aggravation,
28 and not a justification.”) (quotations and citation omitted). And Sims has not identified

1 any case that holds that as a matter of law there cannot be likelihood of confusion where
2 the source of the allegedly infringing product is identified.³

3
4 Sims' argument also ignores the likelihood of reverse confusion, which "occurs
5 when consumers dealing with the senior mark holder believe that they are doing business
6 with the junior one." *Ironhawk Techs., Inc. v. Dropbox, Inc.*, 2 F.4th 1150, 1160 (9th Cir.
7 2021) (quotations and citation omitted). Attributing "Brow Defining Boost" to R+F in
8 the Blog Post enhances, rather than eliminates, the risk that future customers of Plaintiff
9 might mistakenly believe they are dealing with R+F. *Gravity Defyer Corp. v. Under*
10 *Armour, Inc.* is informative on this point. No. LA CV13-01842 JAK, 2014 WL 3766724
11 (C.D. Cal. July 7, 2014). There, the plaintiff sold a shoe bearing the trademark "G Defy."
12 *Id.* at *1. The defendant, Under Armour, later created a shoe called "Under Armour Micro
13 G Defy." *Id.* The court held that the addition of the name "Under Armour" prior to
14 "Micro G Defy" did not eliminate the possibility of confusion. *Id.* at *6. Rather, the
15 court explained that use of the name "Under Armour" may create reverse confusion that
16 Under Armour is the source of the senior mark "G Defy."

17
18 Sims' reliance on *Tiffany (NJ) Inc. v. eBay Inc.*, 600 F.3d 93 (2d Cir. 2010) is
19 misplaced. In that case, eBay used Tiffany's trademark to describe Tiffany products
20 being sold on its website, even though eBay knew the risk that many such products were
21 counterfeit. The court explained that the right to a trademark "does not prevent one who
22 trades a branded product from accurately describing it by its branded name, so long as the

23
24 ³ On this point, Sims cites two cases in which Amazon successfully moved for summary
25 judgment: *Multi Time Machine, Inc. v Amazon.com, Inc.*, 804 F.3d 930 (9th Cir. 2015) and
26 *Lasoff v. Amazon, Inc.*, 741 Fed.Appx. 400 (9th Cir. 2018). In those cases, the confusion at
27 issue was "not caused by the design of the competitor's mark, but by the design of the web page
28 that is displaying the mark," *Multi Time*, 804 F.3d at 937, a fact which readily distinguishes
those cases from the present case. At any rate, the courts in the two Amazon cases did not
announce a general rule, but rather analyzed context specific findings particular to Amazon's
web design made at the summary judgment stage.

1 trader does not create confusion by implying an affiliation with the owner of the
2 product.” *Id.* at 103. Sims is not trying to advertise or resell Plaintiff’s product, in which
3 case she might have a legitimate need to use the Trademark. Rather, she advertised
4 R+F’s competing product. And further, in *Tiffany* the Second Circuit was reviewing a
5 bench trial ruling in favor of eBay, not a decision on a motion to dismiss. *Id.* at 101. As
6 such, the court’s decision there was context specific. *See e.g. Spy Optic, Inc. v.*
7 *Alibaba.Com, Inc.*, 163 F.Supp.3d 755, 765 (C.D. Cal. 2015) (refusing to apply *Tiffany* at
8 the motion for judgment on the pleadings stage to bar trademark claims on similar facts).
9

10 In sum, Plaintiff has sufficiently pled that Sims’ Blog Post was likely to create
11 confusion about the source of the product. The Court therefore **DENIES** Sims’ motion to
12 dismiss as to Plaintiff’s claim of direct trademark infringement.

13

14 **B. Contributory Infringement**

15

16 Sims next moves to dismiss Plaintiff’s claim for contributory infringement against
17 her because Plaintiff has not alleged that she induced any infringement or had any
18 knowledge of Plaintiff, its trademark, or its claim that R+F’s product infringed on
19 Plaintiff’s trademark. (Mot. at 8–10.)

20

21 “To be liable for contributory trademark infringement, a defendant must have
22 (1) ‘intentionally induced’ the primary infringer to infringe, or (2) continued to supply an
23 infringing product to an infringer with knowledge that the infringer is mislabeling the
24 particular product supplied.” *Perfect 10, Inc. v. Visa Int’l Serv. Ass’n*, 494 F.3d 788, 795
25 (9th Cir. 2007). “When a contributory infringement claim concerns the defendant’s
26 supply of something other than a product”—here, Sims’ supply of a favorable product
27 review—“a court will consider the extent of control exercised by the defendant over the
28

1 third party’s means of infringement.” *Gibson Brands, Inc. v. Viacom Int’l, Inc.*, 640 F.
2 App’x 677, 678 (9th Cir. 2016) (quotations and citation omitted).

3
4 Plaintiff has not pled a plausible claim for contributory infringement. First, the
5 Complaint is unclear on Plaintiff’s theory of contributory infringement against Sims and
6 whether such a claim is raised against Sims at all. In the heading to Plaintiff’s fourth
7 cause of action, Plaintiff purports to bring a contributory infringement claim “AGAINST
8 ALL DEFENDANTS.” (Compl. at 15.) From there, Plaintiff alleges that “Defendants
9 have provided or caused to be provided to co-Defendant SIMS the INFRINGING
10 PRODUCT with knowledge, expectation, and/or intention Defendant SIMS would use
11 the INFRINGING PRODUCT in connection with the marketing, offering for sale, and
12 sale of the INFRINGING PRODUCT.” (*Id.* ¶ 88.) Plaintiff goes on to allege that
13 “Defendants have intentionally induced or contributed to or knowingly participated in the
14 infringement of Plaintiff PPI’s BROW BOOST TRADEMARK by Defendants’
15 Consultants and influencers such as Defendant SIMS.” (*Id.* ¶ 91.) From this framing, it
16 seems that Plaintiff is only alleging that R+F contributed to Sims’ alleged trademark
17 infringement.⁴

18
19 Confusing drafting aside, Plaintiff has not pled facts that could plausibly support
20 either prong of the test for contributory infringement mentioned above. As Sims points
21 out in her Motion to Dismiss, the only conduct of hers which Plaintiff alleges in this case
22 was her authorship of a Blog Post in which she favorably reviewed the Allegedly
23 Infringing Product. (*Id.* at ¶ 45; Mot. at 4.) Plaintiff’s Complaint is devoid of any
24 allegations that Sims intended to induce any infringement with her Blog Post. Plaintiff
25
26

27 ⁴ To support a contributory infringement theory against Sims, Plaintiff raises several allegations
28 in its Opposition that are not stated in the Complaint. (Dkt. 21 [hereinafter “Opp.”] at 6.) The
Court will not consider these allegations.

1 seemingly recognizes this, as each allegation of inducement it references in its
2 Opposition does not appear in the Complaint. (Opp. at 6).

3
4 Further, Plaintiff has not alleged that Defendant had any knowledge of the alleged
5 infringement. Plaintiff does allege that on or around August 11, 2020, it sent a cease and
6 desist to “Defendants,” (Compl. ¶ 26), which would have been before Sims authored her
7 Blog Post, (Blog Post). Throughout Plaintiff’s Complaint, however, the term
8 “Defendants” is used to refer to R+F. (*See, e.g., id.* ¶ 88.) And in its Opposition,
9 Plaintiff states that the cease and desist was sent to R+F specifically. (Opp. at 2.) From
10 the record, the Court cannot infer that Sims was notified of the alleged infringement.
11 And finally, Plaintiff has not made any allegation regarding Sims’ control over the
12 alleged infringement. Such allegations are necessary when the contributory infringer
13 provides a service, as Sims did here. *See Gibson Brands, Inc.*, 640 F. App’x at 678.

14
15 Plaintiff has not adequately alleged that Sims intended to induce infringement with
16 her blog post, wrote it with knowledge of the alleged infringement, or exercised any
17 control over any other party’s infringement. The contributory trademark infringement
18 claim is **DISMISSED WITH FOURTEEN DAYS LEAVE TO AMEND.**

19 20 **C. False Advertising**

21
22 Sims next moves to dismiss Plaintiff’s false advertising claim against her because
23 it is duplicative of the infringement claims and fails to allege any false representations by
24 Sims. (Mot. at 10.) Under Cal. Bus. & Prof. Code § 17500, it is unlawful for any person
25 to disseminate a statement “which is untrue or misleading, and which is known, or which
26 by the exercise of reasonable care should be known, to be untrue or misleading.” To be
27 unlawful under Section 17500, a statement need not be false, so long as it is likely to
28 deceive the public. *JS Led Tech. Corp. v. Zhang*, 2014 WL 12561075, at *7 (C.D. Cal.

1 Aug. 7, 2014). Use of a mark that is likely to cause confusion can constitute false
2 advertising under Section 17500. *See Faberge, Inc. v. Saxony Prods., Inc.*, 605 F.2d 426,
3 428 (9th Cir.1979); *Conifer Sec., LLC v. Conifer Cap. LLC*, 2003 WL 1873270, at *2
4 (N.D. Cal. Apr. 2, 2003); *JS Led Tech. Corp*, 2014 WL 12561075, at *8.

5
6 As explained above, Plaintiff has sufficiently pled likelihood of confusion.
7 However, Plaintiff has not alleged actual or constructive knowledge as required under
8 Section 17500. As discussed above, the Complaint coupled with Plaintiff’s Opposition
9 leaves unclear whether Sims received Plaintiff’s cease and desist, and no other basis of
10 knowledge is alleged. The false advertising claim is therefore **DISMISSED WITH**
11 **FOURTEEN DAYS LEAVE TO AMEND.**

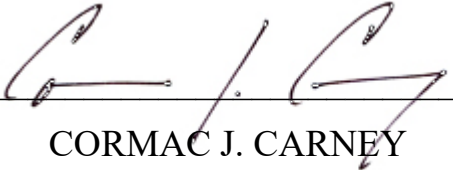
12 13 **D. Unlawful and Unfair Business Practices**

14
15 Finally, Sims moves to dismiss Plaintiff’s claim of unlawful and unfair business
16 practices under Cal. Bus. & Prof. Code § 17200 for the same reasons as the trademark
17 infringement claims. (Mot. at 10-11.) As Sims acknowledges in her motion, “the Ninth
18 Circuit has consistently held that state common law claims of unfair competition and
19 actions pursuant to California Business and Professions Code § 17200 are substantially
20 congruent to claims under the Lanham Act.” *Wecosign, Inc. v. IFG Holdings, Inc.*, 845
21 F. Supp. 2d 1072, 1079 (C.D. Cal. 2012); *see JFeld LLC v. Blanket Lovers*, 2021 WL
22 2302447, at *3 (C.D. Cal. Apr. 29, 2021). Because the Court is not dismissing Plaintiff’s
23 claim of direct trademark infringement, it will not dismiss Plaintiff’s congruous Cal. Bus.
24 & Prof. Code § 17200 claim.

1 **V. CONCLUSION**

2
3 For the foregoing reasons, Sims’ motion to dismiss is **GRANTED** as to Plaintiff’s
4 contributory trademark infringement and Cal. Bus. & Prof. Code § 17500 claims, and
5 those claims are **DISMISSED WITH FOURTEEN DAYS LEAVE TO AMEND**.
6 Sims’ motion to dismiss is **DENIED** as to Plaintiff’s direct trademark infringement and
7 Cal. Bus. & Prof. Code § 17200 claims. If Plaintiff chooses not to file an amended
8 complaint, Sims shall file an answer to Plaintiff’s Complaint by September 7, 2021.

9
10 DATED: August 6, 2021

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12 _____
13 CORMAC J. CARNEY
14 UNITED STATES DISTRICT JUDGE
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